



April 29, 1999

Mr. Darrell W. Corzine  
McMahon, Tidwell, Hansen, Atkins & Peacock, P.C.  
4001 East 42<sup>nd</sup> Street, Suite 200  
Odessa, Texas 79762

OR99-1183

Dear Mr. Corzine:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 124799.

The Ector County Independent School District (the “district”) received a request for various information relating to the requestor, as well as certain attorney fee bills and a report on “alleged corruption in the Technology Department.” You indicate that the district either has released or does not have much of the requested information. Of the responsive information held by the district, you seek to withhold a “Compliance Audit” and several memoranda from the superintendent to the board of trustees. You contend that the information at issue may be withheld under sections 552.101 and 552.111 of the Government Code.

Section 552.101 excepts “information considered to be confidential by law, either constitutional, statutory, or by judicial decision,” including the “informer’s privilege.” The informer’s privilege has been recognized by Texas courts. *See Aguilar v. State*, 444 S.W.2d 935, 937 (Tex. Crim. App. 1969). In *Roviaro v. United States*, 353 U.S. 53, 59 (1957), the United States Supreme Court explained the rationale that underlies the informer’s privilege:

What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of *violations of law to officers charged with enforcement of that law*. [Citations omitted.] The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, *by preserving their anonymity*, encourages them to perform that obligation. [Emphasis added.]

The “informer’s privilege” aspect of section 552.101 protects the identity of persons who report violations of the law. When information does not describe conduct that violates the law, the informer's privilege does not apply. Open Records Decision Nos. 515 (1988); 191

(1978). Although the privilege ordinarily applies to the efforts of law enforcement agencies, it can apply to administrative officials with a duty of enforcing particular laws. Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 285, 279 (1981); *see also* Open Records Decision No. 208 (1978). This may include enforcement of quasi-criminal civil laws. Open Records Decision Nos. 515 (1988), 391 (1983). The privilege does not apply ordinarily to employees "reporting" to their employers about the job performance of other employees. *See* Open Records Decision No. 515.

You claim that the witness interviews included in the Compliance Audit may be withheld under the informer's privilege. In our opinion, you have not established that the interviews were conducted for purposes of reporting to officials with a duty of enforcing particular laws. You may not withhold the interviews under the informer's privilege.

Section 552.101 also protects information coming within the common-law right to privacy. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Common-law privacy protects information if it is highly intimate or embarrassing, such that its release would be highly objectionable to a reasonable person, *and* it is of no legitimate concern to the public. *Id.* at 683-85. We have examined the material you claim is protected by common-law privacy and have marked the material which must be withheld under that aspect of section 552.101.<sup>1</sup>

We have also marked information which is protected by common-law privacy only if the subject of the information is still living. *See* Open Records decision No. 272 (1981) (personal privacy rights lapse at death). Otherwise, this latter information must be released.

Section 552.111 of the Government Code excepts interagency and intra-agency memoranda and letters, but only to the extent that they contain advice, opinion, or recommendation intended for use in the entity's policymaking process. Open Records Decision No. 615 (1993). The purpose of this section is "to protect from public disclosure advice and opinions *on policy matters* and to encourage frank and open discussion within the agency in connection with its decision-making processes." *Austin v. City of San Antonio*, 630 S.W.2d 391, 394 (Tex. App.--San Antonio 1982, writ ref'd n.r.e.) (emphasis added). In Open Records Decision No. 615 at 5, this office held that

to come within the [section 552.111] exception, information must be related to the *policymaking* functions of the governmental body. An agency's policymaking functions do not encompass routine internal administrative and personnel matters . . . . [Emphasis in original.]

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<sup>1</sup>We do not separately address your privacy claim under section 552.102. The scope of section 552.102 privacy protection is the same as that for information protected by common-law privacy under section 552.101. *Hubert v. Harte-Hanks Texas Newspapers, Inc.*, 652 S.W.2d 546, 550 (Tex. App.--Austin 1983, writ ref'd n.r.e.).

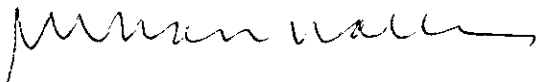
In Open Records Decision No. 429 (1985), this office indicated that information protected by section 552.111 must be prepared by a person or entity with an official reason or duty to provide the information in question. *See also* Open Records Decision Nos. 283 (1981), 273 (1981). This helps assure that the information plays a role in the deliberative process; if it does not, it is not entitled to protection under section 552.111. Open Records Decision No. 464 (1987). *See Wu v. National Endowment of the Humanities*, 460 F.2d 1030 (5th Cir.), *cert. denied*, 410 U.S. 926 (1972).

Section 552.111 does not protect facts and written observation of facts and events that are severable from advice, opinions, and recommendation. Open Records Decision No. 615. If, however, the factual information is so inextricably intertwined with material involving advice, opinion, or recommendation as to make separation of the factual data impractical, that information may be withheld. Open Records Decision No. 313 (1982). We have considered the information for which you claim the protection of section 552.111, and have indicated the portions of the information which we have determined may be withheld under that provision.

Finally, we note that some of the information may be subject to sections 552.024 and 552.117 of the Government Code. Under those provisions, a public employee or official can opt to keep private his or her home address, home telephone number, social security number, or information that reveals that the individual has family members. You must withhold this information if, as of the time of the request for the information, the employee had elected to keep the information private. Open Records Decision Nos. 530 (1989), 482 (1987), 455 (1987). Except as noted above, you must release the requested information.

We are resolving this matter with an informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and should not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Sincerely,



William Walker  
Assistant Attorney General  
Open Records Division

WMW/eaf

Ref.: ID# 124799

encl.     Marked documents

cc:        Mr. Bill Goodman  
             1458 Shady Oak Drive  
             Sparks, Texas 89434  
             (w/o enclosures)